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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

AI PING LU, Plaintiff and Appellant, v. JEFFREY H. LEO, Defendant and Respondent.	B222325 (Los Angeles County Super. Ct. No. BC402669)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Law Office of Kent M. Bridwell and Kent M. Bridwell for Plaintiff and Appellant.

The Thomas Law Group, Stephen J. Thomas and Tim C. Lin for Defendant and Respondent.

Plaintiff and appellant Ai Ping Lu sued for declaratory relief, seeking to establish that defendant and respondent Jeffrey H. Leo had no right to recover on his lien for attorney fees in a prior action, *Lu v. Grewal*, PC31109Y. Lu had retained Leo under a contingent fee agreement to represent her as plaintiff in a lawsuit against Lu's former tenants for breach of a commercial lease. The *Grewal* matter went to trial and ended in a defense judgment. Lu retained new counsel for her successful appeal and retrial, which resulted in an award of compensatory damages and a separate award for attorney fees and costs under the commercial lease. The trial court found approximately $133,000 of the $301,927.78 attorney fee award was attributable to Leo's work on the case. Leo filed a lien against the judgment to recover his fees, and the total fee award was deposited with the superior court. Following a bench trial, the court ruled Leo was entitled to recover his fees based on common counts and *quantum meruit*. Lu's timely appeal followed. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Lu bought a gas station on West Manchester Boulevard with a preexisting tenant (the Grewals), who operated the gas station under a written commercial lease agreement. The agreement provided for attorney fees to the prevailing party in the event of litigation. Three months later, the tenant abandoned the lease and vandalized the property. Lu and her husband repaired the property and ran the business themselves, eventually turning a profit. Lu retained Leo, her brother-in-law, to take legal action against the defaulting Grewals pursuant to the written lease agreement.

The parties' contingency fee agreement, dated October 12, 2002, provided that Lu would pay pay Leo 30 percent of the gross recovery by settlement or otherwise prior to trial or 40 percent of the gross recovery for any settlement or judgment thereafter. If, however, Lu obtained no recovery, then she would owe no attorney fees. The agreement also provided that Leo "shall have a lien on any settlement or judgment obtained by [Lu]." Later, near the first trial date in 2003, the parties executed an addendum,

providing that Lu agreed to be "legally responsible" for attorney fees at the rate of $375 per hour from commencement of Leo's representation. Further, if Lu were to be awarded her reasonable attorney fees and costs in the *Grewal* litigation, she and Leo agreed that all such fees and costs, including those previously billed, whether paid or not, or hereafter billed by [Leo], shall be claimed at the agreed upon rate . . . ."

Prior to trial, on Leo's advice or insistence, Lu retained another attorney—Darrell Forgey—to assist in the trial and paid him a $10,000 retainer. It was understood that Forgey and Leo would split Leo's 40 percent contingency fee, 60 percent to Leo and 40 percent to Forgey.[1] The trial, however, ended in a defense verdict with Lu liable for the Grewals' attorney fees and costs. The trial court (Hon. Howard Schwab) found that despite the Grewals' breach of the lease agreement by abandoning the property, vandalizing the property, and failing to pay rent, Lu suffered no damages because she and her husband mitigated their losses by taking over the commercial business and running it at a profit. Leo told Lu he would not handle an appeal and advised her not to bother with one, believing it would be futile. Lu disagreed and retained attorney J. Steven Kennedy to file the appeal.

In a published opinion on June 28, 2005, Division Seven of this district reversed the judgment, holding that Lu was entitled to damages for unpaid rent based on the fair market rental value standard.[2] The matter was remanded to the trial court for purpose of determining damages based on the correct legal standard and to determine the prevailing party for the purpose of awarding attorney fees.

Lu retained Attorney Bert Rogal to represent her on remand. She also paid Leo $20,000 in June 2006 as a fee to obtain his assistance in preparation for that matter. She

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[1] In June 2009, Forgey entered into a written agreement to assign to Lu any rights he might have in the contingency agreement regarding the *Grewal* trial.

[2] We grant Lu's request for judicial notice as to *Lu v. Grewal* (2005) 130 Cal.App.4th 841 (No. B173008). (See Evid. Code, §§ 452, subd. (a), 459.)

and Leo understood that the payment was made separate and apart from the contingency fee agreement.

On March 14, 2007, the trial court (Hon. Barbara M. Scheper) entered judgment in favor of Lu in the *Grewal* matter, finding defendants liable to Lu for $138,124.73 in damages, plus reasonable attorney fees to be determined. Lu filed a motion to fix attorney fees, seeking $469,214.21 in attorney fees, separate and apart from the $138,124.73 in compensatory damages.

On June 27, 2007, Judge Scheper ruled on Lu's motion. The trial court analyzed in detail Lu's claim for fees based on all of her attorneys' efforts in the trial, remand, and appeal. Lu sought to recover $320,250 in fees for Leo's work, based on representations that he served as her counsel for 14 months, from September 2002 to November 2003, performing 854 hours of legal work at an hourly rate of $375. Leo's efforts were mainly dedicated to discovery and "extensive pretrial preparation." The court found the hourly rate to be reasonable, but the amount of work unjustified in light of the nature of the case—"a single, relatively straightforward breach of lease case in little more than one year." The court also took account of the hours Leo expended in trial preparation, noting that those efforts were made in conjunction with Forgey and his associate. The court disallowed $52,387.50 in fees because Leo failed to justify the need for his work in conjunction with that of cocounsel, which left a balance of $267,862.50 in claimed fees for Leo's work.

Although Judge Scheper recognized that the first trial presented Leo with "some unusual issues," it found that amount excessive and reduced it by half to reflect a reasonable value for his services, awarding Lu $133,931.25 as the attorney fees attributable to Leo's efforts.[3] The trial court also assessed the attorney fees claims by Lu for the work done by the other lawyers she retained—Forgey for work on the first trial, and Kennedy, Rogal, Kent Bridwell, and Timothy V. Milner for the efforts on appeal and remand. The court allowed fees of $31,312.50 for Forgey, $44,492.50 for Kennedy, and

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3 A further $1,367.24 was awarded as costs incurred by Leo in his representation.

$46,770.17 for Rogal, along with costs for each. The total award for attorney fees and costs was $259,120.81, plus interest.[4] The Grewals appealed the judgment awarding the fees and costs. In an unpublished decision, Division Seven affirmed the judgment.[5]

On August 15, 2007, Leo filed his lien for attorney fees in the *Grewal* matter, asserting his right to claim against the proceeds in that action. Due to the presence of the lien, the award was deposited with the superior court, pending determination of Leo's right to the proceeds. Lu filed the underlying declaratory relief action, seeking an order directing the clerk of the court to release to her the sum of $301,927.78, which was the total amount of attorney fees that had been deposited with the superior court by defendants in the commercial lease litigation.

Leo cross-complained, asserting causes of action for (1) breach of contract, arguing the parties' retainer agreement in the *Grewal* action entitled him to 40 percent of Lu's recovery; (2) a common count for debt of at least $125,000 for legal services rendered in the *Grewal* action; and (3) account stated for the same amount based on the same underlying allegations.[6] On August 10, 2009, Leo moved to amend the cross-complaint again to add a claim for *quantum meruit*, based on Lu's judgment in the

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[4] By the time of the underlying trial, the interest had increased the total amount to $301,927.78.

[5] We grant Lu's request for judicial notice as to the unpublished opinion in *Lu v. Grewal*, No. B201355, filed October 8, 2008. (See Evid. Code, §§ 452, subd. (d)(1), & 459.)

[6] Leo's first amended cross-complaint added a fourth cause of action for wrongful denial of contractual obligations based on the original fee agreement, addendum, and settlement agreement of 2006 between Lu, Leo, and Forgey regarding Lu's malpractice action against Leo and Forgey concerning their representation of her in the *Grewal* action. That settlement agreement resolved the malpractice action and provided, among other things, that it did not affect the terms or enforceability of the retainer agreement concerning Lu's obligation to pay attorney fees and costs to Leo arising out of Leo's "past, present and future service as an attorney" for Lu in the *Grewal* action. Lu was not paid to dismiss the malpractice action.

Grewal action in which she was awarded $133,931.25 for Leo's services. The trial court did not make a final ruling on that motion until the trial.

At the completion of the bench trial before Judge William F. Fahey, the court ruled that Leo was entitled to recover on his lien and awarded him $133,931 plus interest on his common counts claims and, alternatively, on his claim for *quantum meruit* relief.[7] The court found the fee award reflected a reasonable valuation of Leo's services in the *Grewal* action, based on its independent review of Judge Scheper's determinations and reasoning. As the court reasoned, Lu had never paid Leo for the services he had rendered in connection with the first trial. Permitting her to retain those moneys would result in an unfair windfall to her. On the other hand, it would be improper to award Leo fees pursuant to the arrangement in the retainer agreement because the court found Leo had effectively terminated that contract upon the completion of the first trial. Indeed, Leo had advised Lu not to appeal, which required her to retain other lawyers.[8] Further, by virtue of the attorney fees and costs award in the *Grewal* matter, Lu received reasonable compensation for the other attorneys she retained for the appeal and retrial. The court rejected Lu's argument that her $20,000 payment to Leo should be credited against his award, finding the $20,000 payment was made pursuant to a separate agreement between Leo and Lu for legal services rendered after the successful appeal.

DISCUSSION

Lu advances a variety of arguments for the proposition that Leo had no legal entitlement to recover against her fee award in the *Grewal* matter and, alternatively, argues the amount of his recovery was excessive as a matter of law. "We review purely

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[7] Leo had previously moved the trial court to amend his complaint to add that cause of action. The court permitted the amendment in accordance with the proof at trial.

[8] It was undisputed that the Grewals repaid Lu for judgment they had received from her after the first trial.

legal questions de novo. (See *People v. Louis* (1986) 42 Cal.3d 969, 986.)" (*Ghadrdan v. Gorabi* (2010) 182 Cal.App.4th 416, 420 (*Ghadrdan*).) As we explain, those contentions fail because the trial court's findings supported *quantum meruit* relief in the amount awarded.[9]

"It is well settled that a contingency fee lawyer discharged prior to settlement may recover in quantum meruit for the reasonable value of services rendered up to the time of discharge." (*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 272, citing *Fracasse v. Brent* (1972) 6 Cal.3d 784, 791; see also *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 461 (*Huskinson*) ["attorneys may recover from their clients the reasonable value of their legal services when their fee contracts or compensation agreements are found to be invalid or unenforceable for other reasons"].) "Quantum meruit refers to the well-established principle that 'the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.' [Citation.] To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made' [citations]." (*Huskinson, supra,* 32 Cal.4th at p. 458.)

As the trial court found, *quantum meruit* relief was a reasonable remedy under the particular circumstances of this case. Lu and Leo entered into a contingency fee agreement that contemplated compensation for legal services rendered, but which could not be enforced because Leo effectively terminated the agreement prior to Lu's ultimate recovery. Despite that termination, the parties never sought a release of potential fee claims. Upon achieving a favorable judgment, Lu successfully moved for an award of

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9 Initially, Lu contends there was no legal basis for awarded relief based on the common count and account stated causes of action. We need not reach those arguments because the trial court's award was also based on the theory of *quantum meruit*, having granted Leo's motion to amend the pleading to add that claim.

attorney fees and costs based in large part on the legal work Leo expended on her behalf—and for which she had not paid him any compensation. Wholly apart from Lu's favorable damages award, Judge Scheper fashioned an award to compensate Lu for all of her attorney fees and costs, with a specific finding as to the value of Leo's services. Judge Fahey reasoned that as between Leo and Lu, the attorney had the better claim to the moneys attributable to Leo's efforts and for which he had not been paid.

There was nothing improper about the trial court's focus on unjust enrichment as the primary basis for its ruling. "The underlying idea behind quantum meruit is the law's distaste for unjust enrichment." (*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 449-450 (*Maglica*).) *Quantum meruit* compensation for the reasonable value of services rendered, rather than the contract amount, "is based upon the premise that a client should not be forced to pay a discharged attorney the compensation called for in the contract, since that amount may reflect neither value received nor services performed and could result in double payment of fees first to the discharged and then to a new attorney." (*Spires v. American Bus Lines* (1984) 158 Cal.App.3d 211, 216 (*Spires*); *Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 156 (*O'Neill*).) Instead, as was done below, compensation should reflect the reasonable value of services rendered. (E.g., *Spires*, *supra*, 158 Cal.App.3d at p. 216.)

Contrary to Lu's assertion, this is not a case such as *Hensel v. Cohen* (1984) 155 Cal.App.3d 563 or *Estate of Falco* (1987) 188 Cal.App.3d 1004, in which the pretrial attorney's abandonment of the case precluded *quantum meruit* recovery. In the former case, a lawyer "accepted a personal injury case on a contingent fee basis, performed some investigation and filed a complaint, but then determined that it was not worth his time to pursue that matter and told his client to look elsewhere for legal assistance . . . ." (*O'Neill*, *supra*, 1 Cal.App.4th at p. 157.) In the latter case, the lawyers "withdrew two months prior to scheduled trial date and the case was subsequently settled under supervision of [the] trial judge." (*Ibid*.) In those situations, the originally retained counsel failed to take the case to trial, as the retainer agreements had contemplated, leaving the client to hire replacement counsel with the implicit mutual expectation that

original counsel would not share in any future recovery. Thus, an appellate court has identified "[t]he one clear bright line rule established by case law to date is that if the attorney withdraws because of a good faith belief that the case is meritless, he or she has no claim on any eventual recovery. After all, by definition the attorney in that situation withdrew not anticipating any recovery in any event." (*Rus, Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal.App.4th 656, 672.)

Here, in contrast, Leo did take the case through trial, as contemplated in the retainer agreement. That agreement did not mention appellate litigation, but specified that Leo "shall have a lien on any settlement or judgment obtained by [Lu]." Moreover, Leo continued to assist Lu following the successful appeal. While it is true that Leo could expect no recovery under the retainer agreement in the event Lu chose to follow his advice, it cannot be said that he intended to forgo any claim to future recovery if she eventually prevailed on appeal and remand. As Lu's own filing before Judge Scheper makes clear, this is not a case in which Leo's representation ended before he rendered any substantial benefit under the retainer agreement. In that matter, Lu argued that Leo rendered legal services at a reasonable value over $300,000. Judge Scheper parsed those representations and the supporting documentation and found Leo provided beneficial services reasonably valued at $133,931.25. Thus, unlike the situation in *Hensel*, *Estate of Falco*, and *Rus*, the granting of *quantum meruit* relief to the original counsel would not diminish the client's damages recovery or come at the expense of the reasonable attorney fees recoverable for her other lawyers' services.

Nor is Lu correct in arguing *quantum meruit* relief is inappropriate because Leo provided no actual benefit to her. (See, e.g., *Maglica, supra,* 66 Cal.App.4th at p. 450 ["The idea that one must be *benefited* by the goods and services bestowed is thus integral to recovery in quantum meruit; hence courts have always required that the plaintiff have bestowed some benefit on the defendant as a prerequisite to recovery."].) As our discussion makes clear, the fact that the first trial resulted in a defense verdict did not mean that Leo's efforts were non-beneficial or detrimental. Indeed, that assertion is belied by Lu's representations to Judge Scheper in her motion to fix attorney fees and

costs, and contrary to Judge Scheper's findings as to the value of Leo's services. It is apparent that the main reason for the defense judgment was the erroneous legal ruling by the first trial court. Further, implicit in Judge Scheper's findings, which allocated the largest component of the fee award to Leo's work, is the understanding that those efforts contributed positively to the eventual victory on remand.

We need not reach the question of whether, as Leo argues, Lu is judicially estopped from arguing that his services were non-beneficial.[10] We are aware that before Judge Scheper, Lu contended that Leo had no right to recover on his lien, despite her representations as to the value of services he rendered. "Judicial estoppel is an extraordinary remedy that should be applied with caution. [Citation.] '[T]he doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' [Citation.]" (*Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, 598.) Leaving aside the question of estoppel, Lu's prior representations amounted to strong evidence in support of the trial court's findings in support of awarding *quantum meruit* relief.

Lu is correct as a general matter that *quantum meruit* relief cannot supply an implicit contractual term that is directly contrary to a term the parties have agreed to. "Quantum meruit is an equitable theory which supplies, by implication and in furtherance of equity, implicitly missing contractual terms. Contractual terms regarding a subject are

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10 Accordingly, we deny Lu's supplemental request for judicial notice as to her respondent's brief in the attorney fee appeal (*Lu v. Grewal*, No. B201355), which Lu intended to rely upon to rebut Leo's judicial estoppel argument. In any event, Lu's position on appeal was clearly set forth in the unpublished opinion (*Lu v. Grewal*, No. B201355), which is before this court. In that opinion, affirming the fee award, the appellate court did not reach the question of whether Leo could recover on his lien because Leo was not a party to that litigation.

not implicitly missing when the parties have agreed on express terms regarding that subject. A quantum meruit analysis cannot supply 'missing' terms that are not missing. 'The reason for the rule is simply that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability. . . .' [Citations.]" (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419.)

Lu is mistaken, however, in asserting the *quantum meruit* award was fatally inconsistent with the term in the retainer agreement that "[i]f there is no recovery for [Lu], then [Lu] shall owe no attorney fees." Lu *did* obtain a recovery. The agreement did not discuss Leo's obligations with regard to a potential appeal, but provided that Leo "shall have a lien on any settlement or judgment obtained by [Lu]." Accordingly, the agreement did not preclude *quantum meruit* relief, particularly in light of the fact that it was Lu who sought recovery for the reasonable value of Leo's services.

Lu also asserts the mere nonpayment of fees cannot support a finding of unjust enrichment. The line of cases supporting that principle, however, applies to a very different set of circumstances. In *Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1263-1264, our Supreme Court invoked the longstanding rule "that licensed brokers, who cannot recover under oral agreements invalid under the statute of frauds, are also prohibited from recovery in quantum meruit for the reasonable value of their services." In contrast, a quantum meruit award for legal services rendered in reliance on a fee-sharing agreement that lacks written client consent in violation of the Rules of Professional Responsibility is permissible. "Allowing quantum meruit recovery when two law firms negotiate a fee-sharing agreement without complying with rule 2-200's written client consent requirement is consistent with the Legislature's policy determination that, even if a particular fee or compensation agreement is not in writing or signed by the client, a law firm laboring under such an agreement nonetheless deserves reasonable compensation for its services." (*Huskinson, supra,* 32 Cal.4th at p. 460.)

Nevertheless, Lu contends she was unfairly prevented from countering the evidence of unjust enrichment when the trial court ruled inadmissible on relevancy

grounds her testimony concerning the actual expenses incurred "to make herself whole following the disastrous first trial." At trial, Lu's counsel sought to introduce evidence that she paid $164,000 to other attorneys to complete the litigation. The court found the offer of proof unconvincing and the testimony unnecessary because evidence of the amount and nature of legal services rendered following the first trial was already before the court by virtue of Judge Scheper's ruling on Lu's motion to fix attorney fees and costs. "So I just don't think we have to go any further with respect to the amounts of the attorney fees. I think the fact of hiring additional lawyers is now before the court subject to cross-examination and other witnesses."

A trial court's decision to admit or exclude evidence under Evidence Code sections on relevancy and related grounds is reviewed for an abuse of discretion. (See *Ghadrdan, supra*, 182 Cal.App.4th at pp. 420-421.) "To establish an abuse of discretion, the complaining party must show that '"the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." [Citation.]' (*People v. Carrington* (2009) 47 Cal.4th 145, 195.)" (*Ghadrdan, supra*, at p. 421.) Lu fails to make such a showing. The evidence identified by the trial court detailed the work done by Attorneys Kennedy, Bridwell, Rogal, and Miller (along with that of Leo and Forgey), and set out the amount of fees sought and awarded. Neither below nor on appeal does Lu explain what additional evidence she would have adduced or how it would have made a difference to the court's findings.

Finally, Lu argues the trial court's award of fees was excessive as a matter of law because it amounted to more than Leo would have received on the original contingency fee agreement. By Lu's calculations, even applying the most generous interpretation of that agreement, the most Leo would have received was $95,338.93—24 percent of the damages award combined with the fees award.[11] While it is true that some courts have reasoned that the parties' agreed upon pro rata contract price establishes "an upper limit

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[11] Pursuant to Leo's 60 percent-40 percent fee-sharing agreement with Forgey, Leo's entitlement would be 24 percent.

on the amount which can be recovered on a restitution or quantum meruit theory" (e.g., *Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 289 (*Cazares*); *Selten v. Hyon* (2007) 152 Cal.App.4th 463, 472, fn. 2 (*Selten*)), they have done so in highly distinguishable circumstances.

Thus, in *Cazares*, Attorneys Saenz and Cazares were cocounsel for the plaintiff in a personal injury action pursuant to a contingent fee agreement. Cazares could not continue his representation because he was appointed to the bench. Saenz and new counsel obtained a favorable settlement, leaving $366,000 as the fee. In remanding the matter to recalculate the amount to be shared with Cazares, the appellate court held "in seeking quantum meruit recovery on a partially performed contingent fee contract, the attorney-plaintiff is not limited to recovering his hourly rate on whatever time has been spent on the case but rather is entitled to an increased amount reflecting the value of the contingency factors as well as the delay in receiving payment for his services." (*Cazares, supra,* 208 Cal.App.3d at p. 289.)

Whatever the strengths or weakness of the *Cazares* rationale might be, we see no clear, much less mandatory, application to this case. The client in *Cazares* had received no separate award for attorney fees and costs. Instead, the pool of funds subject to apportionment between the successive lawyers was the percentage of the client's recovery pursuant to the original contingency fee agreement. (*Cazares, supra,* 208 Cal.App.3d at p. 284.) Leo's lien attached not to Lu's award of damages, but to the separate award of attorney fees and costs, which had been calculated on a highly discounted hourly basis.[12] As such, it was quite reasonable for the trial court to view Lu's argument in favor of a contingency fee percentage cap as the proverbial mixing of apples and oranges.

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[12] In contrast, in *Selten*, the potential award of attorney fees would have to come out of the general recovery, as there was no separate award for attorney fees specifying the value of legal services rendered by the various lawyers. (*Selten, supra,* 152 Cal.App.4th at p. 472, fn. 2.)

DISPOSITION

The judgment is affirmed. Leo is awarded his costs on appeal.

KRIEGLER, J.

We concur:

MOSK, Acting P. J.

KUMAR, J.*

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.